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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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THE CITY OF CHICAGO, *et al.*,
*Petitioner,*

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF AMICI CURIAE OF CITY OF AMES, IOWA, CITY OF COLUMBUS, OHIO, CITY OF HARRISBURG, PENNSYLVANIA, CITY OF INDIANAPOLIS, INDIANA, CITY OF TULSA, OKLAHOMA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, GREATER DETROIT RESOURCE RECOVERY AUTHORITY, JOINT BOARD OF OVERSIGHT FOR THE HAMPTON/NASA/USAF REFUSE-FIRED STEAM GENERATING FACILITY, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NORTHEAST SOLID WASTE COMMITTEE, RESOURCE AUTHORITY OF SUMNER COUNTY, TENNESSEE, SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, ST. CROIX COUNTY, WISCONSIN, AND YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY IN SUPPORT OF PETITIONER

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This brief *amici curiae* is submitted in support of the City of Chicago's petition for a writ of certiorari seeking review of the court of appeals' decision in *Environmental Defense Fund, Inc., et al. v. The City of Chicago, et al.*, 948 F.2d 345 (7th Cir. 1991) (reproduced as Appendix 1a-17a to the petition). The court of appeals ruled that section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i) (1988), requires the ash residue from the operation of waste-to-energy, resource recovery facilities to be managed subject to the hazardous waste management standards of RCRA.[1] *Amici* submit that the court of appeals' decision contradicts the plain meaning and clear legislative intent of section 3001(i), poses a serious obstacle to sound management of the growing municipal solid waste stream in the United States, and requires review by this Court. The petitioner and respondents have each consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

## STATEMENT OF INTEREST OF *AMICI*

A crisis in solid waste management confronts our Nation. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, EPA/530-SW-89-019 (February 1989) (cited below as the "*Agenda For Action*"). The rate at which we produce municipal solid waste continues to increase. As petitioner notes (Pet. at 2), in 1988 we produced 180 million tons of municipal solid waste and the U.S. Environmental Protection Agency ("EPA") projects 216 million tons by the year 2000. Primary responsibility for managing the growing solid waste stream is with local government

[1] The term "municipal solid waste" (or "MSW") refers primarily to residential solid waste, with some contribution of solid (non-hazardous) waste from commercial, institutional and industrial sources. 40 C.F.R. § 241.101(k). A "resource recovery facility" produces energy (steam and electricity) from the combustion of MSW. *See* 42 U.S.C. § 6903(24).

or local government agencies and special authorities like many of the *amici* (or the local government interests that other *amici* represent). *See* 42 U.S.C. § 6901(a)(4).

It is important to emphasize that *amici* and their constituents must be concerned with all of the public health, environmental and economic aspects of managing the municipal waste stream. That is the context in which *amici* have focused on the development of resource recovery facilities as a very important tool for addressing solid waste management. *Amici* are cities, counties, local government agencies, and organizations concerned with municipal solid waste management. In some instances, *amici* both own and operate resource recovery facilities. Other *amici* own resource recovery facilities that are operated by private vendors. Still others have entered long-term contracts with privately owned and operated resource recovery facilities. More specifically, *amici* include a number of cities and counties (Ames, Iowa; Columbus, Ohio; Harrisburg, Pennsylvania; Indianapolis, Indiana; Montgomery County, Ohio; Nashville, Tennessee; St. Croix County, Wisconsin; and Tulsa, Oklahoma). Other *amici* are local government agencies and special authorities (Davis County Solid Waste Management and Energy Recovery Special Service District (Utah); Greater Detroit Resource Recovery Authority (Michigan); Joint Board of Oversight, Hampton, Virginia/NASA/USAF Refuse-Fired Steam Generating Facility; Resource Authority of Sumner County, Tennessee; Southeastern Public Service Authority of Virginia; York County Solid Waste and Refuse Authority (Pennsylvania); and the Northeast Solid Waste Committee (North Andover, Massachusetts)).[2] Another of the *amici*, the

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[2] The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southhampton. The Northeast Solid Waste Committee is established under Massachusetts law as a corporate entity performing

Minnesota Resource Recovery Association, is a partnership consisting primarily of public entities working with the private sector in the development, ownership and operation of resource recovery facilities and other types of waste management facilities.[3] *Amicus* National Institute of Municipal Law Officers (NIMLO) is a nonpartisan organization representing more than 1,400 local governments and their attorneys. NIMLO is dedicated to sound resolution of nationally-important legal issues affecting municipalities, including waste management issues.

Resource recovery facilities are key components of the integrated waste management systems that many local governments throughout the United States are pursuing (integrated waste management means the complimentary use of several waste management methods—source reduction, recycling, waste combustion with energy recovery and landfilling—to handle waste in an environmentally sound and economic manner). *Agenda for Action* at 16. Resource recovery facilities use municipal solid waste as fuel to produce steam and electricity. These environmentally sound facilities also produce ash residue as a result of the combustion process, and manage the ash as nonhazardous waste consistent with the

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governmental functions concerning waste management on behalf of the following twenty-three Massachusetts communities: Acton, Andover, Arlington, Bedford, Belmont, Boxborough, Burlington, Carlisle, Dracut, Hamilton, Lexington, Lincoln, Manchester, North Andover, North Reading, Peabody, Tewksbury, Watertown, Wenham, Westford, West Newbury, Wilmington and Winchester.

[3] The Minnesota Resource Recovery Association's waste-to-energy facilities serve the following Minnesota counties: Anoka, Benton, Carlton, Carver, Clay, Dodge, Douglas, Grant, Hennepin, Hubbard, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin. The other members of the Association are: Winona and Dakota Counties, City of Fergus Falls, City of Red Wing, Northern States Power Company, United Power Association, Quadrant Company, Richards Asphalt, and ABB Resource Recovery Systems.

requirements of Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949a, and related state laws.

The implications of the court of appeals' decision that such ash is instead governed by the hazardous waste management standards of RCRA Subtitle C, 42 U.S.C. §§ 6921-39b, are severe. The resource recovery facilities that *amici* represent produce thousands of tons of ash daily and are designed to operate 365 days a year. On a composite basis the 137 resource recovery facilities now operating in the United States produce approximately 7.9 million tons of ash annually. *See* Jonathan V.L. Kiser & B. Kent Burton, *Waste-to-Energy in the United States, A Status Update*, Proceedings of the Utah State University Waste Management Conference 1-2, 7 (March 4-5, 1992) (cited below as "*Kiser & Burton*") (calculated based on data presented). Aside from the financial implications of managing this ash as hazardous waste, *amici* and their constituents face serious enforcement consequences as well—the prospect of lawsuits based on the Seventh Circuit's decision is of great concern to resource recovery facilities.[4] Finally, the decison below undermines carefully designed solid waste management plans for *amici* and many other communities throughout the United States that have turned to resource recovery as an environmentally sound strategy for municipal solid waste management.

## REASONS FOR GRANTING THE WRIT

As the EPA has noted, there is a "serious and growing solid waste problem in many American cities. As a nation, we are generating more garbage all of the time, and we don't know what to do with it." *Agenda for Ac-*

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[4] The only exception is the Second Circuit, where the governing interpretation of section 3001(i) directly conflicts with the decision below. *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 493 (1991).

*tion* at 8. The volume of municipal solid waste in the United States continues to increase steadily, both in overall tonnage and per capita. Indeed, for the period 1988 to the year 2000 per capita volume is expected to increase by 10 percent. U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, at ES-3, EPA/530-SW-90-042 (June 1990) (cited below as "*1990 Update*"). Traditionally, landfilling of MSW had been the primary management alternative, taking 80 percent or more of the municipal waste stream. *Agenda for Action* at 22-23. Combustion of MSW, which previously had somewhat wider use, declined into the 1970's and early 1980's as old incinerators were closed down due to increasingly stringent air pollution control standards. *1990 Update* at 54. Although Congress had begun to recognize the dimensions of the problem, a landfill crisis followed in the 1980's. *Id.* at 56.[5]

How to respond to these developments—selecting the best management alternatives—poses very important policy questions for all levels of government. A principal response has been the adoption of state and federal laws and policies encouraging development of resource recovery facilities that employ state-of-the-art air pollution control systems. Waste combustion with energy recovery is favored over landfilling, the principal alternative. *See 1990 Update* at 4. Although more costly in the short run, resource recovery is environmentally superior to landfilling. *See* 54 Fed. Reg. 52209, 52245, column 3 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in an MWC [municipal waste combustor] [rather] than to landfill them. Not only is landfilling a disfavored waste manage-

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[5] Congress warned in 1976 that "land is too valuable a national resource" to be devoted to disposal of most of our solid waste stream, and that "alternatives to existing methods of land disposal must be developed". 42 U.S.C. §§ 6901(b)(1) and (8).

ment option (see RCRA section 1002(b)(8)), but it is sound policy to recover the energy value of the combustibles rather than burying them" [citations omitted]).[6] In adopting the Solid Waste Disposal Act Amendments of 1980, Congress expressly recognized that the use of technology to produce usable energy from waste needed to be encouraged, both to reduce our reliance on diminishing fossil fuel resources, as well as to reduce the burden of disposing of increasing volumes of MSW. 42 U.S.C. § 6941a. Following Congress' lead, a number of states adopted laws and policies that provided further encouragement to resource recovery facilities. The result has been a significant increase since 1985 in the development of these facilities by local government. But as a consequence of the court of appeals' decision, local government now confronts the specter of RCRA enforcement actions like the instant case and the overturning of carefully made solid waste management decisions by *amici* and many other communities who are faced with possible shutdown of resource recovery facilities and cancellation of new facilities.

1. Turning first to the immediate enforcement impact of the decision below, there are approximately 137 resource recovery facilities operating in the United States today (and another 75 under construction or in various stages of planning). *See Kiser & Burton* at 1-2. These facilities are located throughout the United States, and they manage ash residue subject to RCRA Subtitle D

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[6] *See also* Michigan Department of Natural Resources, *Michigan Solid Waste Policy* 6 (1988) (although landfilling is still the least costly waste management option, it is also "the least desirable option because of the risk of groundwater contamination and the waste of some valuable materials"); Commonwealth of Massachusetts, Department of Environmental Protection, *Toward a System of Integrated Solid Waste Management/The Commonwealth Master Plan* 45 (June 1990) ("Preferable to landfilling for the management of most wastes, combustion offers more effective environmental control and monitoring systems with less potential for long-term, irreversible damage to the environment").

and related state laws as nonhazardous waste; at no time have these facilities managed ash as hazardous waste pursuant to RCRA Subtitle C. Although the impact of the decision below is most imminent in the Seventh Circuit (if the Court does not grant the petition, then such facilities would have no choice but to begin managing resource recovery facility ash subject to Subtitle C requirements), the decision below will, absent review by this Court, create serious uncertainty for essentially all resource recovery facilities.

The court of appeals' decision poses a Hobson's choice for resource recovery facilities. One option would be to change their method of operation and begin managing ash residue subject to RCRA Subtitle C. That change in operations would carry a very steep price, however. As explained in more detail below (pp. 11-12), the cost of managing ash residue as hazardous waste could easily cause current waste management costs to more than double, far outstripping the financial resources of the affected communities, and would also require dedicating limited hazardous waste landfill capacity to disposal of resource recovery facility ash.

If the instant petition is not granted, it is expected that respondents (or other organizations with similar interests) will file additional suits identical to the suit filed below in the Northern District of Illinois (and the related suit filed in the Southern District of New York in the *Wheelabrator* case, *see supra* note 4). Both suits were filed pursuant to the citizen suit provisions of section 7002 of RCRA, 42 U.S.C. § 6972. A citizen suit may be filed under that statute against any person "who is alleged to be in violation" of any provision of RCRA. *Id.* at § 6972(a). In these suits, the district courts are authorized to impose injunctive relief and civil penalties of up to $25,000 per day of violation. *Id.; see also* 42 U.S.C. § 6928(g). The statute of limitations that generally applies in similar civil penalty actions is five years.

*See* 28 U.S.C. § 2462; *see also Public Interest Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73-76 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (applying 28 U.S.C. § 2462 to citizen suits under section 505 of the Federal Water Pollution Control Act). A resource recovery facility produces ash every day that it operates, and it is apparent that the failure to follow the Seventh Circuit's view of section 3001(i) of RCRA puts such facilities at considerable enforcement risk. In short, granting the petition here will eliminate the troubling uncertainty that results from the Circuits' conflicting interpretations of section 3001(i).

2. Aside from these enforcement implications, the decision below will seriously undermine carefully designed solid waste management plans for many communities and threaten the financial viability of most, if not all, resource recovery facilities due to the cost of managing resource recovery facility ash as hazardous waste. The economic burden that results from the court of appeals' interpretation of section 3001(i) cannot be reconciled with Congress' intent to encourage resource recovery facilities.

As noted earlier, federal and state laws and policies adopted in response to the growing solid waste dilemma vigorously encourage expanded use of resource recovery facilities and decreased reliance on landfilling of municipal solid waste. In that connection, section 32(a) of the Solid Waste Disposal Act Amendments of 1980, 42 U.S.C. § 6941a, recognizes that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste". The laws of a number of states are very similar. For example, section 32(f) of the Michigan Solid Waste Management Act, Mich. Comp. Laws § 299.432(4), prescribes a statewide "strategy to encourage

resource recovery and establishment of waste-to-energy facilities", as well as "potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities", with the "goal of reducing land disposal to unusable residuals by the year 2005". Section 2(b) of the Tennessee Solid Waste Planning and Recovery Act, Tenn. Stat. Ann. § 68-31-602(b), provides that, among other things, "waste-to-energy incineration (resource recovery) will substantially lessen our dependence on landfills as a means of disposing of solid waste, aid in the conservation and recovery of valuable resources, [and] conserve energy in the process. . . ." Similarly, section 102(2) of the Pennsylvania Solid Waste Management Act, Pa. Stat. Ann. title 35, § 6018.102(2), encourages the development of resource recovery facilities "as a means of managing solid waste, conserving resources, and supplying energy".[7]

Implemented through careful solid waste management planning by local government, these policies have resulted in a significant increase in resource recovery facilities. Between 1985 and 1988 annual combustion of MSW with energy recovery increased from 7.6 to 24.5 million tons.

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[7] *See also* Va. Code Ann. § 10.1-1402 (Virginia Waste Management Board directed to promote the development of resource recovery systems); Ohio Rev. Code Ann. § 3734.40 (offsite waste management, including municipal waste combustion, is a "critical component[] of the economic structure of this state, and when properly controlled and regulated, makes substantial contributions to the general welfare, health and prosperity of the state and its inhabitants . . ."); Wis. Stat. § 159.05(4)(s) (combustion of MSW with energy recovery as a substitute for the use of nonrenewable fuels is in the public interest and should be encouraged if implemented by a state-approved program that protects health and the environment). States have also adopted policies to implement these statutory directives. For example, the goal of the *Michigan Solid Waste Policy, supra* note 6, is to manage 35 to 45 percent of the state's municipal waste through the use of resource recovery facilities and reduce the amount of MSW going to landfills to 10 percent by the year 2005.

*1990 Update* at 55, Table 26; *see also id.* at 53. The 1988 level is projected to double by the year 2000 and reach 55 million tons. *Id.* at 73. Indeed, the Bush Administration projects a seven-fold increase between 1991 and 2010 in the amount of electric energy generated in the United States from MSW combustion. *See* U.S. Dept. of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

The court of appeals' majority decision is a severe setback—and a classic "Catch-22"—for *amici* and scores of communities that followed Congress' lead and developed resource recovery facilities. These actions were taken with knowledge that resource recovery facility ownership and operation was not only environmentally superior, but also generally more costly in the short run than landfilling MSW.[8] If the ash residue from a resource recovery facility must now be managed subject to hazardous waste standards, the cost of resource recovery facility operations will increase dramatically. In this connection Chicago's petition notes that a conservative 1990 average cost to dispose of ash at a hazardous waste landfill would be $210 per ton. Pet. at 9 n.3 (citing ICF, Inc., *1990 Survey of Selected Firms in the Commercial Hazardous Waste Management Industry, Draft Report* (prepared for U.S. EPA, Office of Policy Analysis) (Sept. 17, 1991)). That average is consistent with disposal cost estimates that a number of the *amici* have developed internally (*amici*'s estimates range from $162 to more

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[8] The processing or "tipping" fees charged by modern resource recovery facilities are generally $40 to $100 per ton of municipal solid waste processed. *See* Jonathan V.L. Kiser, "A Comprehensive Report on the Status of Municipal Waste Combustion", *Waste Age* 109, 156 (November 1990). In contrast, the 1990 average landfill tipping fee in the United States was $26.56 per ton. *See* National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6, Table 10 (1991).

than $400 per ton, including transportation).[9] At $210 per ton for ash disposal, the tipping fees charged by individual resource recovery facilities would easily double their current levels.[10] In short, the court of appeals' decision portends a dramatic increase in cost far beyond any level of cost anticipated by the many local governments that chose resource recovery facilities as an environmentally sound solid waste management strategy. The result could be to force many existing facilities to shut down, and future development of new facilities would essentially be eliminated, contrary to RCRA's policy of encouraging resource recovery.[11]

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[9] At present there are only 21 hazardous waste landfills in the United States. *See* Jeffrey D. Smith, "Hazardous Waste Landfill Facility Information", *Environmental Information Digest* 24 (March 1992) (cited below as "EI Digest"). As a result, long distance transportation would frequently be required.

[10] For example, one of the *amici*, the York County Solid Waste and Refuse Authority, currently charges a tipping fee of $53.75 per ton of MSW, of which approximately $4.50 represents ash disposal costs in a nonhazardous waste landfill (York County currently pays approximately $15.00 per ton for ash disposal; based on a 70 percent weight reduction ratio when a ton of MSW is combusted, the $15.00 figure represents a $4.50 portion of the tipping fee for each ton of MSW received for processing). Using the conservatively estimated $210 per ton cost for disposal of resource recovery facility ash as hazardous waste, and adding long distance transportation costs, tipping fees would more than double.

[11] It is likely to be more economic for a community that is presently served by a resource recovery facility to shut down the facility, landfill the community's MSW, and pay the associated landfill tipping fees as well as the fixed costs on the dormant resource recovery facility rather than operate the facility and have to absorb the cost to manage ash residue as hazardous waste. Moreover, the potential liability associated with navigating the complex scheme of federal hazardous waste regulations would further discourage resource recovery facilities, in direct contradiction of Congress' policy of encouraging these facilities.

One additional point should be noted in this regard. Hazardous waste landfill disposal capacity is limited. It has been estimated that as of the end of 1987, the United States had 34 million tons of hazardous waste landfill capacity.[12] Only one hazardous waste landfill has been permitted since 1987 (in fact, only one hazardous waste landfill has been permitted during the past twelve years).[13] Given the difficulty of siting hazardous waste landfills, significant additional capacity is unlikely to become available soon. On the other hand, resource recovery facilities currently in operation produce approximately 7.9 million tons of ash each year. *See supra*, p. 5. If as a result of the decision below that ash is required to be disposed in hazardous waste landfills, it can readily be seen that all of the United States' current hazardous waste landfill capacity would be consumed within a very short period.

3. Finally, the court of appeals' decision is wrong as a matter of statutory construction. This Court has often stated that in determining the meaning of a statute, courts should look to the particular statutory language at issue within the context of the statute as a whole, including its object and policy. *E.g., Crandon v. United States*, 494 U.S. 152, 158 (1990). The Seventh Circuit's narrow reliance on the absence of the word "generation" in section 3001(i) to conclude that resource recovery facility ash is subject to hazardous waste regulation ignores that fundamental tenet of statutory construction.

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[12] *See Regulation of Municipal Solid Waste Incinerators: Hearing on H.R. 2162 Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 198 (1989) (testimony of David L. Sokol, Chairman of the Institute of Resource Recovery). EPA has not published an estimate of hazardous waste landfill capacity in the United States.

[13] This is the Last Chance, Colorado hazardous waste landfill, which began operation in July, 1991. *See EI Digest, supra* note 10, at 24. Last Chance has 2.5 million tons of capacity. *Id.* at 26.

When Congress adopted section 3001(i) as part of the 1984 amendments to RCRA the regulatory context in which Congress addressed resource recovery facility ash was one that already exempted such ash from regulation as a hazardous waste. More specifically, EPA's 1980 "household waste exclusion" unambiguously excluded from hazardous waste regulation the ash residue that remains following combustion of household waste. *City of Chicago*, 948 F.2d at 349 (EPA's 1980 preamble "most definitely exempted ash from regulation as a hazardous waste"). Adopted as part of the EPA's regulations governing RCRA's hazardous waste management program, the household waste exclusion implemented congressional intent to exclude waste streams produced at the household level from hazardous waste management. *See* 45 Fed. Reg. 33084, 33099 (May 19, 1980) (quoting S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976) (RCRA's hazardous waste management program "is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances")). EPA concluded that "[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). Importantly, EPA emphasized that incinerator ash was not subject to hazardous waste regulation because the exclusion applies to "all phases of [the] management" of household waste, including ash residue after treatment, such as incineration.

Thus, when Congress enacted section 3001(i) in 1984, the regulatory status of MSW ash was clear: ash remaining after incineration of household waste was not subject to RCRA Subtitle C hazardous waste regulation. Congress is presumed to know an agency's interpretation of a law pertinent to legislation Congress is enacting, *Miles v. Apex Marine Corp.*, 111 S. Ct. 317 (1990), and this is the con-

text in which Congress was operating when it added section 3001(i)—the "Clarification of Household Waste Exclusion"—in 1984. The statute provides in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" if the facility receives and burns only household waste and nonhazardous commercial or industrial solid wastes and establishes appropriate procedures to assure that hazardous wastes are not received at or burned at the facility. 42 U.S.C. § 6921(i). In other words, the household waste exclusion already encompassed "all phases" of the "management" of household waste, including "treatment" (*e.g.*, incineration), and section 3001(i)'s use of the term "otherwise managing" continued the Subtitle C exemption for ash residue. Indeed, the plain language of the section 3001(i) "clarification" does nothing to terminate the prior exclusion for ash from resource recovery facilities that burn household and nonhazardous commercial or industrial waste. Instead, section 3001(i) "clarified" the preexisting household waste exclusion by providing that a resource recovery facility that burns household waste and nonhazardous waste from sources other than households (*e.g.*, commercial sources) will remain entitled to the exclusion if precautions are taken to ensure that the facility does not accept or burn hazardous waste. S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). This unique mechanism is not available to any other type of waste management facility.

The court of appeals' majority ignores this context and narrowly reads section 3001(i) as an evisceration of EPA's regulatory position by focusing on the absence of the word "generation" in section 3001(i). Nothing in the legislative history even remotely suggests that Congress, by not including the word "generation", intended the result reached by the court of appeals. To the contrary, since 1976 Congress has on numerous occasions expressed its

intent to promote resource recovery facilities. *See, e.g.*, 42 U.S.C. § 6902(a)(1) (objectives of RCRA include promotion of resource recovery and resource conservation systems). In fact, the Senate Report accompanying section 3001(i) explicitly states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284 at 61.

Key legislative history confirms that section 3001(i) excludes resource recovery facility ash from hazardous waste regulation. The Senate Report accompanying the legislation states that the section 3001(i) exclusion applies to "[a]ll waste *management* activities including the *generation*, transportation, treatment, storage and disposal of waste." S. Rep. No. 284 at 61 (emphasis added). Put another way, Congress unequivocally intended to exclude "all waste management" activities associated with resource recovery facilities. That is precisely what the statute says—activities that would constitute "otherwise managing hazardous wastes," which necessarily includes generation of hazardous waste, are excluded. When examined in this overall legislative context, the court of appeals' reliance on the absence of the word "generation" in section 3001(i) is plainly incorrect.[14]

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[14] The Conference Committee adopted the Senate's proposed clarification of the household waste exclusion without change, stating only that "the Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility." H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984).

The Seventh Circuit's interpretation of section 3001(i) also renders the statute essentially meaningless. *See, e.g., Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987) (it is presumed that Congress does not pass meaningless legislation). As explained by the district court in *Wheelabrator, supra* note 4, if resource recovery facility ash is not excluded from hazardous waste regulation, "it is difficult to understand what, if any, benefit resource re-

Finally, the Seventh Circuit's decision may also result from a fundamental misconception regarding the nature of landfilled municipal solid waste and resource recovery facility ash. The court of appeals said "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills." 948 F.2d at 352. But contrary to the court of appeals' assumption, landfilling of MSW poses greater environmental concern than landfill disposal of ash, a fact that is reflected in governmental policies encouraging the development of resource recovery facilities. *See supra* note 6.[15]

In sum, the Seventh Circuit's conclusion that by a sleight of hand Congress significantly limited the scope of the household waste exclusion is wrong and entirely

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covery facilities derive from the exemption." 725 F. Supp. at 763 n.12. Simply put, if a resource recovery facility receives only non-hazardous waste, it never will be subject to hazardous waste regulation as a treatment, storage or disposal facility and no exemption would be needed. The only meaningful interpretation of section 3001(i)—that MSW ash is exempt from hazardous waste regulation—was correctly reached by the Second Circuit in *Wheelabrator*.

[15] *See generally* State of Florida, Division of Administrative Hearings, *Recommended Order* at 6, *Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility* (No. 90-3942EPP) (December 9, 1991) (the leachate from resource recovery facility ash is far less of an environmental concern than the leachate from MSW). It should also be noted that the Seventh Circuit's above-quoted statement appears to have been made without considering the record in this case, which shows that ash from Chicago's Northwest Waste-to-Energy Facility is disposed in Michigan at a monofill (a sanitary landfill that receives only municipal incinerator ash) that is lined and equipped with ground water monitoring and leachate collection systems. Pet. at 6-7. Those disposal standards are generally required by Michigan law, Mich. Comp. Laws § 299.432a, and typical of the laws of a number of other states. *See, e.g.*, Mass. Regs. Code title 310, § 19.119.

inconsistent with the language and purpose of RCRA section 3001(i). *See Green v. Block Laundry Machine Co.*, 490 U.S. 504, 521 (1989) (party contending that legislative action changed governing law has the burden of showing that the legislature intended such a change). That interpretation of section 3001(i) jeopardizes the viability of existing resource recovery facilities and the development of new facilities, and encourages environmentally inferior alternatives (such as landfilling) for managing municipal solid waste, all of which is contrary to clearly expressed federal policy.

To resolve the conflict in the Circuits and clarify this important issue of federal environmental law, this Court should grant the City of Chicago's petition for a writ of certiorari and reverse the judgment of the court of appeals.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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